

make a new guidance off of old guidance documents.

So on March 24, 2016, I replied back to them, pointing out that the 2010 and 2011 letters did, in fact, create new policy. In my reply, I also expressed concern over the reliance by the Office of Civil Rights on letters of findings to support their policy requiring the preponderance-of-the-evidence standard. But these letters are not binding on other schools, either. In fact, they show that the Office for Civil Rights looks to and has enforced these policies enumerated only in “Dear Colleague” letters across the country.

Legal scholars at Harvard Law and Penn Law have argued that the Office for Civil Rights’ sexual harassment policy was “inconsistent with the most basic principles we teach.” Title IX was not written and has never been said to imperil these “basic principles,” as the professors pointed out, which include free speech, due process, and adherence to good administrative procedures. To me, this is evidence that the “Dear Colleague” letters changed the application of title IX and its regulatory landscape in fundamental ways. These policy changes should be subject to rulemaking process, not just inventing new guidelines.

Other prominent voices have also stated their concerns with the substance of and the manner in which the guidance documents were issued. Take, for example, the director of the civil liberties-minded Foundation for Individual Rights and Education, known as FIRE, who stated that “OCR has consistently avoided giving real answers to questions about its power to issue regulations outside the bounds of the law. It cannot avoid accountability forever.”

An analysis from Inside Higher Ed, a respected news outlet for the postsecondary education community, stated:

Last week, the Department clarified in a letter . . . that the Dear Colleague letter acts only as a guidance for college and does not “carry the force of law.” But many college presidents and lawyers argue that the Department’s Office for Civil Rights treats the guidance far more than as a series of recommendations. Instead, they say, OCR uses the letter to determine which colleges are in violation of Title IX and to threaten the federal funding of those that don’t follow every suggestion. Some Department officials have recently said there are clear “musts” and clear “shoulds” in the guidance, though colleges say the Office for Civil Rights does not seem to clearly differentiate between the two. Attempts to clarify which parts of the letter should be read as hard regulations and which should be considered recommendations have only led to more confusion and frustration.

That from this well-respected entity. The publication also quotes Terry Hartle of the American Council on Education saying that “the department’s political leadership can say or write whatever they want, but where the rubber meets the road is where the Office for Civil Rights shows up to investigate cases on campus, and in those cases they consistently treat every sin-

gle word of the guidance as an absolute mandate.”

Kent Talbert, a lawyer who served as general counsel at the Department of Education from 2006 until 2009, went on the record to say that the response to my letter that I got back from Dr. King and from the Department of Education “glosses over” concerns regarding whether the Department circumvented notice-and-comment rulemaking.

Hans Bader, another former attorney in the Office for Civil Rights, characterized OCR’s response as a “question-begging rationalization” that did not “address the criticisms . . . made by many lawyers and law professors.” Mr. Bader went on to say that “the 2011 Dear Colleague letter that was the subject of Senator LANKFORD’s questions is just the tip of the iceberg when it comes to the Education Department imposing new legal rules out of thin air, without codifying them in the Code of Federal Regulations, or complying with the notice-and-comment requirements of the Administrative Procedure Act.”

Commentator George Will penned an op-ed on the same issue as my letter, and he said that when the Department argues “its ‘guidance’ letters do not have the force of law—it’s a distinction without a difference.”

Last week in my conversations with Dr. King about the Department of Education’s practice of issuing guidance in lieu of rulemaking as required by law, he stated that if a school has a problem, they can challenge the Department in court, basically saying: If the schools have a problem with our guidance, they can sue us.

Were the Office for Civil Rights to take adverse action against a school for failure to comply with the guidance documents and if that school fought back in court, I believe that school would prevail. In fact, the legislative and policy director for FIRE said that institutions “would be on very solid ground in challenging OCR because OCR’s statements and policies clearly skirted the notice-and-comment requirements.” But you tell me what school would have an incentive to accept the existential threat that litigation poses to their university when they file suit against the Office for Civil Rights? They risk reputational harm, legal penalties, and recision of Federal funding, all because the OCR thinks no one would actually sue them. Many schools decide the risk is not worth the reward, and the Department of Education knows it.

While individual companies or entire industries can and often do fight back against regulatory overreach from the Department of Labor or EPA, the Department of Education is in a position to hold Federal funding ransom if universities don’t comply with its policies even when those policies are unlawful abuses of regulatory power. This is unacceptable.

Just because we share an objective of equality and school safety doesn’t

mean we can turn a blind eye to a Federal department running roughshod over the very regulatory process we require. Here the ends certainly do not justify the means, and schools and the very students we want to protect suffer as a result.

I do want to stress that I admire Dr. King’s dedication to bettering our Nation’s schools. All Americans are undoubtedly enriched by contributions made by such conscientious and exceptional educators. I thank him for his previous time of service, which is an impressive record.

Likewise, I appreciate that these guidance documents predate Dr. King’s service at the Department and that he had no role in overseeing their development or issuance, but when asked to reexamine them and the process of how they were created, he protected them instead of acknowledging the problem with the process. That tells me there are more “Dear Colleague” letters coming to our schools, and this agency will continue to make up the rules in a vacuum and threaten Federal funding for those who dare not comply.

As part of my continuing discussions with the Office for Civil Rights, the Department has assured me they will take steps to clarify the interpretive role of guidance, increase transparency, and enhance opportunity for public input. I am encouraged that the Office for Civil Rights has committed to these improvements, and I look forward to a continued discussion on how better guidance practices, both in the Office for Civil Rights and across the entire government, can actually occur. Unfortunately, these proposals don’t answer the questions I have asked Dr. King, nor do they in any way address the fundamental problems with the 2010 or 2011 “Dear Colleague” letters or the Office for Civil Rights’ broader practice of issuing guidance in lieu of rulemaking. Because I have not received a full answer to the questions I asked the Department and because Dr. King does not acknowledge that this overreach is even occurring within the agency he is nominated to lead, I have no choice but to oppose his nomination today.

Time will tell whether this Department of Education is about to take a new direction with new leadership or whether they will continue the same path of coercive overreach they have already been on. This needs to stop. The American people require a voice in the rulemaking process, and I hope this can press on today.

With that, I yield the floor.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The bill clerk read the nomination of John B. King, of New York, to be Secretary of Education.

The PRESIDING OFFICER. Under the previous order, there will be 90 minutes of debate equally divided in the usual form.

The Senator from Oklahoma.

Mr. LANKFORD. I ask unanimous consent that all time during quorum calls between 4 p.m. and 5:30 p.m. today be equally divided in the usual form.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LANKFORD. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. COTTON. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ILLEGAL IMMIGRATION

Mr. COTTON. Madam President, last Thursday the Democratic candidates for President had a debate. They made several extremely irresponsible statements about immigration policy. I oppose their calls to reward mass illegal immigration with blanket amnesty, which would undermine the rule of law, cost Americans jobs, drive down wages for working Americans, and invite more illegal immigration.

But what must President Obama think? After all, he has attempted to grant amnesty by fiat to over 5 million illegal immigrants, although the courts have blocked most of those amnesties for now. Yet the Senator from Vermont and Hillary Clinton both insisted that the President hadn't gone far enough. They would expand on his actions and go even further. In fact, a debate moderator called President Obama "the deporter in chief," and Hillary Clinton tacitly accepted the characterization, saying she wouldn't deport nearly as many illegal immigrants as President Obama has—which of course isn't a terribly high bar to clear since deportations are down 42 percent since the start of President Obama's second term and last year deportations hit a 10-year low. Still, I can't imagine President Obama is too pleased with his would-be successor.

I also can't imagine a more opportunist and irresponsible position than the one taken by Hillary Clinton. As she panders for votes, she limited deportation priorities to violent criminals and terrorists. Apparently, Secretary Clinton will welcome con artists, identity thieves, and other non-violent criminal illegal immigrants with outstretched arms into our country.

Even more astonishing, she stated unequivocally, "I will not deport children. I would not deport children." As I stated, this is pure opportunism. For instance, I imagine this child shown in this poster would have liked Secretary Clinton's policy to have been in effect during her husband's administration. This is the famous picture of Elian Gonzalez, a 6-year-old Cuban boy who reached our shores despite his mother tragically dying at sea. Elian's U.S.-based family pleaded with the Clinton administration to grant him asylum, as was our common custom for refugees from communism, but President Clinton rejected those pleas, siding with the Castros. Federal agents stormed the private residence and apprehended Elian at gunpoint. Where was Secretary Clinton? I guess she didn't have a no-kids policy back then. But we don't have to guess. The then-First Lady was campaigning for Senate in New York. She opposed congressional action to protect Elian and advocated returning the boy to Cuba—contrary to a decades-long bipartisan consensus that we should grant safe harbor to refugees from totalitarian Communist states.

Yet, the sad story of Elian Gonzalez isn't the most recent or harmful example of her opportunism. Just two summers ago, our country faced a migrant crisis on our southern border. Nearly 140,000 people—about half of them unaccompanied kids—poured across our border. Notably, most did not flee from the Border Patrol or try to avoid capture; on the contrary, they ran to U.S. border agents.

Why would brandnew illegal immigrants, having successfully crossed our border, turn themselves in? The answer is simple: They have been led to believe they would be allowed to stay.

From the multiple administration memos instructing agents not to fully enforce immigration law to President Obama's unlawful Executive amnesties, to the Senate's own amnesty legislation, every signal from Washington said our political class lacked the willpower to secure our borders and enforce our immigration laws in the country's interior.

Some might say these policies and proposals wouldn't have covered the newly arrived immigrants; that they would have faced deportation. Perhaps, but what they signaled was a complete unwillingness to enforce our immigration laws, just as amnesty granted in 1986 invited another generation of illegal immigrants to migrate to our country and wait for the next amnesty.

These policies certainly gave the human traffickers who transported and abused these kids plenty of grounds to tell desperate parents: Send your kid north with me, and he will get a permiso. In the end, they weren't wrong. Nearly 2 years later, only a very tiny minority of unaccompanied children have been deported. In fact, more than 111,000 unaccompanied minors entered the United States illegally from 2011 to 2015, but only 6 percent have

been returned to their home countries. Yes, some may have received a deportation order from a court—usually after failing to appear for a hearing. Yet the Obama administration has made little to no effort to locate them.

Therefore, it is fair to say the human traffickers, the so-called coyotes, weren't wrong, and many Central American parents took an understandable risk. After all, a life in America in the shadows—as advocates for amnesty and open borders call it—may be preferable to poverty and violence back home. While these factors may have been the push factors in the migrant crisis, there can be no doubt that the pull factors of amnesty, deferred action, nonenforcement, economic opportunity, and safety were just as strong, if not stronger.

That is why even the Obama administration tried to address them. President Obama met with leaders of Honduras, Guatemala, and El Salvador to seek their assistance. Vice President BIDEN flew to Guatemala and publicly urged parents not to believe the coyotes' promises of amnesty. The Secretary of Homeland Security Jeh Johnson wrote an open letter to Central American parents, and, yes, Hillary Clinton got involved too. Secretary Clinton stated in 2014 that these children "should be sent back as soon as it can be determined who responsible adults in their families are." She insisted that "we have to send a clear message: Just because your child gets across the border, that doesn't mean the child gets to stay."

That was the right position then, and it is the right position now, even if real action didn't back up the Obama administration's words, but that was then, and this is now, in the middle of another flailing Presidential campaign. Secretary Clinton now says she would not deport children under any circumstances, not even those who just arrived or presumably those who arrive in the future.

We have come to expect such opportunism from the "House of Clinton," but even worse is the irresponsibility. Put yourself in the position of a desperate parent in Central America. You live in Third World conditions. Work is scarce. Food and water are a struggle. Power doesn't always come on with the flip of a switch. Gangs control many of the streets. Murder rates are some of the highest in the world. You have every reason to try to escape these conditions or at least get your kid out, but where to go?

You just got your answer. Hillary Clinton, one of the most famous people in the world—one of only six people likely to be the next President of the United States—just broadcast new hope to the world: You can come to the United States.

Of course, it is a peculiar kind of hope. She didn't say go to our Embassy and seek asylum. She certainly didn't say get on an airplane and fly safely to